No. 89-1493

In The
Supreme Court of the United States

October Term, 1989

AIR LINE PILOTS ASSOCIATION INTERNATIONAL,
Petitioner,

v.

JOSEPH E. O'NEILL, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

This is a fair representation dispute between striking pilots and their union. The questions presented are as follows:

1. Whether review by this Court of an order remanding a summary judgment case for trial is premature.

2. Whether the duty of fair representation precludes arbitrary actions by a union in negotiating a strike settlement and, if so, whether there is sufficient factual showing of arbitrary conduct here to warrant trial.

3. Whether the criteria applied by the Fifth Circuit conflict with any decisions of this Court or any Circuit.

ADDITIONAL PARTIES

In addition to the named plaintiffs listed on page ii of the petition, Respondents (hereinafter the "O'Neill Group" or the "pilots") comprise a certified class of approximately 1,400 past or present Continental Air Lines ("Continental") pilots who withdrew their services from Continental at any time from October 1, 1983 through October 31, 1985, in connection with a strike called by their union, the Air Line Pilots Association, International ("ALPA"), and who were not working for Continental on October 31, 1985, the date the strike ended.

COUNTERSTATEMENT OF THE CASE

Brief Procedural History.

This dispute arises out of a secret strike settlement reached by ALPA with Continental. In its amended complaint, the O'Neill Group sought recovery on four counts. Count One alleged a breach of the duty of fair representation which ALPA and various ALPA officers owed the pilots under the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* Count Two alleged a violation of the voting rights of the pilots guaranteed under Section 101(a)(1) of the Labor-Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 411. The O'Neill Group also asserted two additional claims.

The discovery was extensive and the record was complex, comprising in excess of 6,000 pages. In August 1987, ALPA moved for judgment on the pleadings and for summary judgment on all counts. The O'Neill Group's response included five volumes of affidavits and other exhibits. Immediately following oral argument in November 1987, the trial court granted ALPA's summary judgment motion and dismissed the O'Neill Group's suit. The only explanation for the ruling were some remarks from the bench.

The O'Neill Group appealed the summary judgment as to the duty of fair representation and LMRDA claims and, on October 31, 1989, the Fifth Circuit issued its opinion affirming as to the LMRDA claim but reversing and finding disputed issues of fact as to the duty of fair representation claim. ALPA's request for a rehearing and for a rehearing en banc was rejected by the Fifth Circuit in an order dated December 27, 1989.

ALPA's Agreement To The Secret Strike Settlement.

ALPA has omitted critical facts from its statement of the case and stated items as "fact" when they are heavily disputed. We emphasize here some points that were important to the Fifth Circuit's ruling.

The focus of this case is a secret strike settlement that ALPA representatives reached with Continental in October of 1985 and maneuvered to have entered as a bankruptcy court "order and award" on October 31, 1985 (R 149).[1] The secret strike settlement altered the seniority bidding system Continental used before and during the strike. Under this system any pilot interested in a pilot position could bid for his preferred position by status (i.e., captain, first officer, second officer), base (city), and equipment type (R 163, Att. 9). Continental then allocated vacant pilot positions solely according to seniority, determined by the date a pilot first flew for Continental (*id.*).

ALPA's secret strike settlement altered the seniority system beginning with Continental's "85-5 bid." The 85-5 bid was a posting in September 1985 of over 440 pilot vacancies that would be available in 1986 (R 149, Ex. 80; R 163, Att. 8). Continental "awarded" the 85-5 bid positions to pilots who worked during the strike (the "nonstrikers") but the positions were still vacant when the strike ended on October 31, 1985.[2] ALPA nonetheless agreed with Continental to give the nonstrikers "superseniority" preferences for the 170 captain posi-

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[1] "R" references are to the record in the district court, as identified by that court's docket sheet. The secret strike settlement agreement (the "order and award") is No. R 149, and a copy is appended to ALPA's petition as Appendix 4.

[2] ALPA mischaracterizes the decision below as holding that strikers could "displace" permanent replacements from the positions *awarded* under the 85-5 bid (pet., p. 9). The record was uncontroverted that the positions had not been *filled* by nonstrikers before the strike ended.

tions in the 85-5 bid and the captain positions that became available in subsequent bids after the strike. [3]

The settlement gave the first 100 captain positions in the 85-5 bid to nonstrikers, even though they were far less senior than the returning strikers many of whom were captains before the strike, and the remaining 70 to returning strikers who agreed to waive bankruptcy claims against Continental [4] (R 149, Ex. 39). It also gave the nonstrikers half of Continental's post-strike captain positions under a 1:1 ratio that required one nonstriker to become a captain for every striker who advanced to captain after the strike, despite the nonstriker's lower seniority (*id.*). In both cases the settlement permitted nonstrikers to bid for the captain positions of their choice and Continental assigned the returning strikers to only the positions not picked by the nonstrikers (*id.*).

The Long-Term Effects Of The Secret Strike Settlement.

The secret strike settlement was a major change in Continental's seniority bidding system. In one illustrative case, the settlement allowed a nonstriker to become a captain ahead

[3] Superseniority is a term of art that refers to granting seniority-based benefits on some criteria other than seniority to employees whose seniority would not otherwise entitle them to those benefits. In *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 235 (1963), this Court held that superseniority preferences based upon nonparticipation in concerted activity is "inherently discriminatory" and, therefore, unlawful. *See NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967) (strikers are entitled to nondiscriminatory reinstatement as vacancies become available after a strike).

[4] Returning strikers who refused to waive claims as a condition of recall were put at the end of the recall list, regardless of their overall seniority, the dates they offered to return to work or any other objective factor (R 149, Ex. 39). It is unlawful to require strikers to waive such rights as a condition of recall after a strike. *American Cyanamid Co. v. NLRB*, 592 F.2d 356 (7th Cir. 1979).

of a returning striker who was a captain before the strike and had 19 years more seniority [5] (R 163, Att. 13).

ALPA negotiator Kirby Schnell summed up the effect of these provisions in notes he made during the last couple days of negotiations. In Schnell's words, the settlement "bastardized [seniority] beyond all recognition" and "f—ked my people forever" (R 163, Att. 7.5). In other notes Schnell described the 1:1 ratio as follows:

> 1:1 forever busts sen[iority]. Deal so far already violated that concept—I've already killed myself on that issue. To go further bastardizes the sen[iority] concept forever.

(R 149, Ex. 1.1). Indeed, the settlement was so bad that an unconditional offer to return to work would have been better for the striking pilots. [6] ALPA therefore insisted on submitting the settlement to the bankruptcy court rather than having ALPA's president sign his name to it and present it to the pilots for ratification [7] (R 149, Exs. 9, 10; R 163, Att. 4). ALPA

[5] This is nearly identical to the preference the Court struck down in *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963) (unlawful for employer to give nonstrikers a 20-year seniority preference in post-strike advancement).

[6] The record below showed that Continental maintained its seniority bidding procedure throughout the strike and allowed crossovers to bid their full pre-strike seniority while still on the preferential recall list awaiting recall. Continental had previously returned striking flight attendants and machinists to work in seniority order to available positions when their unions made unconditional offers to return to work (R 163, Att. 5.5). ALPA's outside lawyers advised ALPA that Continental would be required to fill vacancies with returning strikers (R 163, Att. 5.5), just as United was required to do in litigation concluded two months earlier. *See ALPA v. United Air Lines, Inc.*, 614 F. Supp. 1020 (N.D. Ill. 1985), *aff'd in relevant part*, 802 F.2d 886 (7th Cir. 1986), *cert. denied*, 480 U.S. 946 (1987). Additionally, Continental told ALPA in September 1985 that it would reinstate strikers with full seniority under an unconditional offer to return (R 163, Att. 1).

[7] There was uncontroverted evidence that ALPA promised the pilots they would be permitted to ratify any strike settlement with Continental (R 149, Exs. 47, 56, 67; R 163, Att. 5.1), as the Fifth Circuit noted in its opinion. *See* 886 F.2d at 1448. The pilots and the Continental Master Executive Council, however, never heard about the settlement until after it had been entered by the bankruptcy court.

has consistently blamed the bankruptcy judge for the settlement terms (R 149, Exs. 15, 16).

These changes were not simply a "temporary transition" as ALPA asserts (pet., p. 10 n.6). Under the secret strike settlement, as well as under Continental's prior bidding system, bidding is for future vacancies, not present positions. Thus, a less senior nonstriker who obtains a captain position under the settlement cannot be displaced in later bids by even the most senior pilot. [8] As Mr. Schnell's notes reflect, these changes last "forever" (R 163, Att. 7.5; R 149, Ex. 1.1).

Decision Of The Fifth Circuit Court Of Appeals.

Upon review of the circumstances surrounding the secret strike settlement and the long-term effects it will have on the seniority system by favoring nonstrikers over strikers, the Fifth Circuit held that summary judgment on the pilots' duty of fair representation claim was wrong for at least two reasons. First, the Fifth Circuit concluded that a fact-finder could find that had ALPA simply agreed to an unconditional return to work, the pilots would have been able to retain both their seniority and their litigation rights against Continental. *O'Neill v. ALPA*, 886 F.2d 1438, 1446 (5th Cir. 1989). To enter into a secret strike settlement that was worse than an unconditional offer to return to work, the Fifth Circuit reasoned, would be arbitrary and irrational and, thus, a breach of the duty of fair representation. 886 F.2d at 1444.

Second, the Fifth Circuit found that a secret strike settlement that expressly favors nonstrikers over strikers is evidence that the union intentionally discriminated against the striking pilots. 886 F.2d at 1447. Although ALPA contended that the secret strike settlement was the only option open to it, the Fifth Circuit properly found that the record contained facts supporting the pilots on that question.

[8] Some "bumping" can take place in a reduction in force, but that has not occurred. Certain equipment freezes and other aspects of the bidding system not important here also operate to lock pilots into their positions and make the settlement provisions more than temporary (R 149, Ex. 103).

REASONS FOR DENYING THE WRIT

I. This Court Should Not Issue A Writ Of Certiorari To Review The Interlocutory Decision Of The Fifth Circuit Court Of Appeals Because The Ultimate Outcome Of This Case Is Not Known.

A determinative fact in this Court's decision whether to grant ALPA's petition is that no final judgment exists in this case. The Fifth Circuit merely found that there were disputed issues precluding entry of summary judgment against the pilots and remanded to the district court for further proceedings. The lack of finality is "of itself alone" grounds for denial of ALPA's petition. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). *See Brotherhood of Locomotive Firemen v. Bangor & Aroostook Railroad Co.*, 389 U.S. 327, 328 (1967) (denying certiorari because the Court of Appeals remanded the case and thus it was not yet ripe for review).

In the few instances where this Court has taken review of interlocutory orders, it has done so only on extraordinary grounds, such as reversing an improvident and unusual exercise of jurisdiction, *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 52 (1938), or compelling the court of appeals to issue a writ of mandamus requiring the district court to hold a jury trial. *Beacon Theatres v. Westover*, 359 U.S. 500 (1959).

No extraordinary circumstances are presented here. Depending on the facts to be developed at trial, ALPA can be found guilty of discriminatory conduct toward the pilots. If the trial court makes such a finding, there will be no need to decide the issue ALPA now presents, which is whether ALPA's arbitrary conduct breached the duty of fair representation. Thus, any review by this Court must await the outcome of the proceedings on remand and ALPA's current petition must be denied.

II. This Court's Recent Decision In *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry* Resolves Any Question Over The Applicable Standard.

The first issue ALPA raises in its petition is whether the standard articulated in *Vaca v. Sipes*, 386 U.S. 171 (1967) (hereinafter *Vaca*), applies to union conduct in negotiating an agreement. This Court's recent decision in *Chauffeurs, Teamsters & Helpers, Local 391 v. Terry*, 58 U.S.L.W. 4345 (March 20, 1990) (hereinafter *Terry*), makes clear that the *Vaca* standard applies squarely to union conduct in negotiations.[9] *Vaca* is not limited, as ALPA asserts, to union conduct in administering a collective bargaining agreement.

> The duty [of fair representation] requires a union "to serve the interests of all members [in a bargaining unit] without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." A union must discharge its duty both in bargaining with the employer and in its enforcement of the resulting collective bargaining agreement.

[9] ALPA also construes *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953), too narrowly. There the Court affirmed a district court decision finding that the seniority system at issue was not " 'arbitrary, discriminatory or in any respect unlawful.' " 345 U.S. at 333 (quoting the district court). The Court held that a union is empowered to make concessions "in the light of all relevant considerations." *Id.* at 338. This is the same "arbitrary" standard articulated later in *Vaca*, 386 U.S. at 177, followed by the Fifth Circuit in *Tedford v. Peabody Coal Co.*, 533 F.2d 952, 957 (5th Cir. 1976), and in the decision below.

58 U.S.L.W. at 4346, *quoting Vaca*, 386 U.S. at 177.[10]

Terry vitiates any possible dispute as to whether the Fifth Circuit applied the proper legal standard and moots any perceived need to review this case to reconcile decisions in other circuits.

III. There Is No Split Among The Circuits On The Legal Standard Applicable To The Union's Conduct In This Case.

ALPA overstates the conflict among the circuits that existed prior to *Terry*. Cases in both the Seventh and Ninth Circuits apply *Vaca* in the negotiating context. *See Bernard v. ALPA*, 873 F.2d 213 (9th Cir. 1989);[11] *Hendricks v. ALPA*, 696 F.2d 673, 677 (9th Cir. 1983) (recognizing that arbitrary union conduct in negotiations breaches the duty of fair representation); *Alvey v. General Electric Co.*, 622 F.2d 1279, 1289 (7th Cir. 1980) (relying upon the Fifth Circuit's decision in

[10] *Terry* follows other recent decisions of this Court that adhere to *Vaca* as the proper duty of fair representation standard. *See Breininger v. Sheet Metal Workers Int'l*, 110 S. Ct. 424, 429 (1989) ("We have long recognized that a labor organization has a statutory duty of fair representation ... 'to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct' "), *quoting Vaca*, 386 U.S. at 177; *Communications Workers of America v. Beck*, 108 S. Ct. 2641, 2645 (1988); *United Mine Workers of America Health & Retirement Funds v. Robinson*, 455 U.S. 562, 575-76 n.20 (1982) ("in the collective bargaining process, the union must fairly represent the interests of all employees in the unit," *citing Vaca*, 386 U.S. at 177). In *Breininger* the Court rejected the union's argument that the duty of fair representation is analogous to 29 U.S.C. § 158(b) (proscribing intentional union discrimination), which is much like the standard ALPA argues for here. The Court held squarely that the duty of fair representation goes further " 'to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law.' " 110 S. Ct. at 436, *quoting Vaca*, 386 U.S. at 182.

[11] In *Bernard* the Ninth Circuit affirmed summary judgment against ALPA for violating its duty of fair representation by discriminating against former Jet America pilots in negotiations over a seniority integration agreement with Alaska Air. 873 F.2d at 218. The same result can be reached on this record.

Tedford v. Peabody Coal Co., 533 F.2d at 957); *Barton Brands, Ltd. v. NLRB*, 529 F.2d 793, 799 (7th Cir. 1976) ("arbitrary conduct without evidence of bad faith has been held by this Circuit to constitute a breach of the duty"). [12]

In the Eleventh Circuit, *Parker v. Connors Steel Co.*, 855 F.2d 1510 (11th Cir. 1988), *cert. denied*, 109 S. Ct. 2066 (1989), the case ALPA cites as in conflict with the Fifth Circuit, holds squarely that arbitrary conduct in negotiations violates the duty of fair representation:

> A violation of the Union's duty of fair representation in the context of negotiations with the Company is established if the Union's conduct in negotiations is arbitrary, irrational, or undertaken in bad faith.

Id. at 1520. *Parker* also recognizes, as did the court below, that union misconduct in the ratification of an agreement violates the duty of fair representation. *Id.* at 1521.

IV. There Is No Conflict Between The Ruling Below And This Court's Decision In *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants.*

ALPA erroneously asserts that the decision below is contrary to this Court's decision in *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants*, 109 S. Ct. 1225 (1989) (hereinafter *TWA*). First, the court below cited the

[12] In *Barton Brands*, the Seventh Circuit held that the union would be found in violation of its duty of fair representation for abridging the long-established seniority rights of a minority of employees unless, on remand, it showed "some objective justification for its conduct." 529 F.2d at 800. This holding accords squarely with the decision below and with the Fifth Circuit's prior decision in *Tedford*, 533 F.2d at 957. *Thomas v. United Parcel Service, Inc.*, 890 F.2d 909 (7th Cir. 1989), the Seventh Circuit case cited by ALPA in conflict with the decision below, was a grievance case and did not overrule *Barton Brands*. Moreover, in *Thomas*, the court recognized a difference between it and other circuits but reconciled the difference when it held that the "arbitrary, discriminatory, or in bad faith" standard of *Vaca* applies generally, although a union may be given greater deference in matters of judgment, such as negotiations. 890 F.2d at 922.

Eighth Circuit's decision in *TWA* for the point that pilot positions that were not yet occupied at the end of the strike were vacancies to which strikers were entitled to return. *Independent Federation of Flight Attendants v. Trans World Airlines, Inc.*, 819 F.2d 839 (8th Cir. 1987) (trainees who had not yet served in positions were not permanent replacements and returning strikers were entitled to those positions). *Accord ALPA v. United Air Lines, Inc.*, 614 F. Supp. 1020 (N.D. Ill. 1985), *aff'd in relevant part*, 802 F.2d 886 (7th Cir. 1986), *cert. denied*, 480 U.S. 946 (1987). This Court did not grant certiorari on this "vacancy" point. *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants*, 108 S. Ct. 1219 (1988) (certiorari granted only to consider displacement of crossovers).

Second, the record was uncontroverted that all of the 85-5 bid positions were still vacant when the strike ended on October 31, 1985; there was no evidence that the nonstrikers had even begun training for those positions by that date. The Fifth Circuit's determination that unfilled positions are vacancies available to returning strikers does not conflict with this Court's *TWA* decision. 109 S. Ct. at 1232 ("positions *occupied* by newly hired replacements . . . are simply not 'available positions' to be filled" by returning strikers) (emphasis added).

V. The Fifth Circuit Correctly Concluded That ALPA's Conduct Could Be Found Violative Of Its Duty Of Fair Representation.

The facts in this record and the controlling case law compel the conclusion that the Fifth Circuit correctly held that ALPA's conduct in secretly settling this strike on terms that discriminated between striking pilots and nonstriking pilots could be found violative of the union's duty of fair representation. It is beyond dispute that superseniority preferences of the type embraced in the secret strike settlement are unlawful. *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963); *Great Lakes Carbon Corp. v. NLRB*, 360 F.2d 19, 22 (4th Cir. 1966) (superseniority plan favoring employees who worked during a strike is unlawful on its face).

A union breaches its duty of fair representation when its conduct is antithetical to the statute that authorizes the union's existence and charges it with furthering the statute's goals. [13] Courts have had no difficulty in finding that unions have breached their duty of fair representation for conduct just like ALPA's conduct here. [14]

Furthermore, the Fifth Circuit correctly discerned that the union in this case entered into a strike settlement agreement that is worse for the pilots who were on strike than an unconditional offer to return to work, with no explanation beyond argument of counsel. This is enough for the fact-finder to find that ALPA acted arbitrarily and irrationally. *See Tedford v. Peabody Coal Co.*, 533 F.2d 952 (5th Cir. 1976); *Barton Brands, Ltd. v. NLRB*, 529 F.2d 793 (7th Cir. 1976). *See also Ford Motor Co. v. Huffman*, 345 U.S. at 338 (union must act "in the light of all relevant considerations").

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

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[13] *See United Mine Workers of America Health & Retirement Funds v. Robinson*, 455 U.S. 562, 575 (1982) ("The terms of any collective-bargaining agreement must comply with federal laws . . . . Obviously, an agreement must also be substantively consistent with the National Labor Relations Act."); *Scofield v. NLRB*, 394 U.S. 423, 430 (1969) (union may not choose a position which interferes with a "policy Congress has imbedded in the labor laws").

[14] *Bernard v. ALPA*, 873 F.2d 213 (9th Cir. 1989) (granting summary judgment against ALPA for discrimination against former Jet America pilots in a seniority integration agreement); *Bowman v. Tennessee Valley Authority*, 744 F.2d 1207 (6th Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985) (union's agreement to seniority provisions which discriminated on basis of concerted activity breached its duty of fair representation); *Jones v. Trans World Airlines, Inc.*, 495 F.2d 790, 797 (2d Cir. 1974) ("Discrimination in seniority based on nothing else but union membership is arbitrary and invidious and violates the union's duty to represent fairly all members of the bargaining unit."); *Chrapliwy v. Uniroyal, Inc.*, 458 F. Supp. 252, 282 (N.D. Ind. 1977) (granting summary judgment against union on female employees' fair representation claim where union negotiated a contract discriminating against them).

RESPECTFULLY SUBMITTED.

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